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Nos. 97-1704 and 97-1695

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,
Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT CLASS REPRESENTATIVES GERALD AHEARN, *ET AL.*

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PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately described in the petition except that James Drake and Juanita Drake are not plaintiff class representatives (and, indeed, as far as respondents are aware, were not parties below) and William Mitchell is an additional class representative and a respondent herein.

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COUNTER-STATEMENT OF THE CASE[1]

This is the *Ahearn* case not the *Amchem* case, although one could not tell that from the two petitions for certiorari filed herein. To transmute the one into the other as they must to support their arguments urging certiorari, petitioners assiduously ignore the *Ahearn* factual record and grossly mischaracterize the fundamental controversy among the parties that drove *this* settlement, caused the District Court and the Fifth Circuit to approve it, and caused the Fifth Circuit to reaffirm it on remand from this Court after *Amchem* was decided.

To say that petitioners ignore the factual record is not hyperbole. The Flanagan petitioners do not even print the District Court's Findings of Fact and Conclusions of Law in their appendix; although the Ortiz petitioners print both, they never refer to either. Petitioners do not contend that any specific factual findings of the District Court were clearly erroneous or that the Court of Appeals erred in failing to so hold. Rather, petitioners simply revise the facts as needed to make their arguments sound legal rather than factual in nature.

As described at length in the District Court's findings, this dispute and its resolution are very different from *Amchem*. This 1993 settlement arose out of a 14-year

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[1] This brief is being filed on behalf of respondents Gerald J. Ahearn, James R. Dennis, Charles W. Jeep, William J. Mitchell and James Ellison (collectively the "class representatives") in opposition to the petition for certiorari filed on behalf of Esteban Ortiz, *et al.* (cited as "Pet."). Respondents are not filing a separate brief in opposition to the petition for certiorari filed by James Flanagan and David H. Middleton (No. 97-1695) in this case, but the arguments contained in this brief are equally applicable to the Flanagan petition. Citations to the Appendix ("App. __") are to the appendix to the Ortiz petition.

insurance coverage litigation between Fibreboard and its insurers, Continental and Pacific (the "coverage case"). App. 266a-270a. Depending on the resolution of that litigation, either Fibreboard would have virtually unlimited insurance for its asbestos liabilities (App. 268a) or Fibreboard would be hopelessly insolvent — its existing $235 million enterprise value dwarfed by the more than $1.2 billion of outstanding settlement obligations it had already incurred by the end of 1992. App. 303a, 377a. Thus, as of 1993, compensation not yet paid to persons exposed to Fibreboard's asbestos-containing products for their resulting injuries (whether already manifested or to occur in the future) was completely at the risk of an unfavorable outcome in the coverage case. App. 272a-276a, 357a-358a.

Class counsel were aware of the enormity of this risk. They had been separately representing individual plaintiffs against Fibreboard for over a decade in thousands of cases that were resolved either for partial payments, coupled with promises to pay the balance in the future when and if insurance funds were available, or by assignments of Fibreboard's disputed insurance rights against Continental. App. 277a-279a, 285a-288a. Those settlements with Fibreboard included a 1992 multi-state assignment settlement (aggregating thousands of separate pending cases), executed over the objection of Continental, that was led by two of class counsel from the Ness Motley firm. Litigation of the validity and enforceability of that assignment settlement against Continental was commenced before the District Court in early 1993 and subsequently resolved by a modification of the settlement acceptable to Continental that was submitted to the District Court for fairness approval. App. 302a-303a, 317a-319a. Also, for two years beginning in early 1991, class counsel had been negotiating with Fibreboard a possible global insurance assignment settlement involving a class of all

present and future claimants. By the spring of 1992 those negotiations had proven to be unworkable. App. 291a-302a.

By the time Fibreboard and Continental jointly reopened settlement negotiations with class counsel following Judge Parker's approval of the modified Ness Motley settlement on August 9, 1993, class counsel, Fibreboard and Continental were all faced with imminent argument and decision in the California intermediate appellate court of the critical issues in the coverage case. App. 270a, 330a-331a. Fibreboard and Continental had previously proven themselves unable to settle the insurance dispute because, among other things, Fibreboard was unwilling to accept any amount in settlement that would not, in its judgment, cover its entire asbestos exposure to existing and future claimants whose claims were potentially covered by the Continental and Pacific policies together with the costs of defending all those claims in the tort system. App. 301a-302a, 329a-330a; Tr. 604, 1378. For Fibreboard, a settlement anywhere short of that goal was little better than losing the coverage case since it would lead, inevitably, to bankruptcy. Conversely, Continental was unwilling to offer an amount large enough to satisfy Fibreboard since to do so would have represented capitulation, notwithstanding the many defenses to coverage that Continental was asserting.[2]

Faced with the choice of watching Fibreboard and Continental roll the dice, and thereby risking the total loss of any prospect of meaningful recovery for the tens of thousands of class members holding potential asbestos-related claims

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[2] Pacific had entered into a separate settlement with Fibreboard in 1992 that provided up to $330 million that could be used to pay so-called post-1959 claims – claims that were otherwise uninsured. Payment of the bulk of the funds in that settlement – some $225 million – was conditioned on barring Continental's contribution claims against Pacific based on their mutually overlapping pre-1959 insurance. App. 282a-285a.

against Fibreboard, class counsel agreed in August 1993 to reopen negotiations with Continental and Fibreboard, joined subsequently by Pacific, for a three-way non-opt-out settlement of all insurance coverage issues. App. 321-322a, 325a-326a. By August of 1993, these issues included not only those raised in the coverage case itself but the question whether, assuming that coverage was otherwise available, Fibreboard's previous assignment settlements were enforceable against Continental or whether they constituted a breach of Fibreboard's insurance contract with Continental, thereby potentially forfeiting Fibreboard's coverage rights under the policy. App. 228a. This separate issue was being concurrently litigated in the *Andrus* case in California in which one of class counsel was involved. App. 198a, 288a-290a; *see also* Fib. Trial Ex. 304.[3]

These insurance coverage issues posed monumental risks to the class of persons holding potential asbestos claims against Fibreboard. As the testimony at the settlement fairness hearing detailed, there was a substantial possibility that the California appellate courts would significantly roll back Fibreboard's trial court victory in the coverage case. App. 275a-276a. Indeed, a California intermediate appellate court subsequently held, in *Andrus*, that the Fibreboard assignment settlements were breaches of its agreements with Continental. App. 379a-380a.

It was under these circumstances that an agreement in principle to a $1.535 billion global settlement (the "Global Settlement") was reached among the parties on August 27,

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[3] Also at issue was whether Continental was entitled to contribution from Pacific – an issue being litigated in a separate action before Judge Parker involving the Ness Motley settlement. App. 303a. This latter issue was ultimately settled between Pacific and Continental in the course of the August 1993 multi-party global negotiations. App. 325a-326a.

1993, on behalf of a class of persons who had been exposed to Fibreboard asbestos products but who had not yet filed suit against Fibreboard. App. 329a-331a.

In addition, as further protection for the class's need for a resolution of the insurance risk, class counsel insisted as a condition of the Global Settlement that the insurers and Fibreboard negotiate and agree to a separate back-up settlement of the insurance disputes (the "Trilateral Settlement") against the eventuality that, for any reason, the Global Settlement could not receive court approval. App. 329a-330a. Fibreboard objected to this condition because Continental declined to pay any more in the Trilateral Settlement for future claims than the $1.525 billion it had agreed to pay for those claims in the Global Settlement.[4] App. 330a. Fibreboard's objection was based on the fact that, were the Trilateral Settlement ever to become operational, Fibreboard would have much less money to pay claimants because it would incur hundreds of millions of dollars of defense costs in litigating future claims in the tort system — costs that would be altogether eliminated under the Global Settlement. App. 330a, 362-365a.

As a result of Fibreboard's concern about its potential financial exposure under the Trilateral Settlement, it took from August 27 to October 12, 1993, for Fibreboard and the

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[4] Continental did agree to pay an additional $475 million in the Trilateral Settlement to cover claims of persons who had already filed lawsuits against Fibreboard, but not yet settled or gone to judgment in those cases as of August 23, 1993. This group of persons was not included in the class involved in the Global Settlement. App. 354a-355a, 552a-575a. Because the class of claimants covered by the Trilateral Settlement includes this large group of additional persons, petitioners' statement that the Trilateral Settlement provides "half a billion *more*" than the Global Settlement (Pet. 4) compares apples and oranges and is extremely misleading.

insurers to reach a definitive written agreement on the Trilateral Settlement. App. 332a-335a. In the meantime, on September 9, 1993, class counsel had filed the complaint against Fibreboard that initiated the *Ahearn* class action, the insurers had intervened, and all parties had jointly requested certification, for settlement purposes only, of a non-opt-out class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. App. 334a.

Following execution of the Trilateral Settlement on October 12, 1993, the parties began negotiations of the definitive written Global Settlement agreement, including, in particular, the negotiation of the Trust Distribution Process ("TDP"). The TDP set forth the procedures by which individual class members would obtain resolution and payment of their claims against Fibreboard, which claims in turn would be channeled to the trust created by the Global Settlement. App. 346a-347a, 583a-621a. Those negotiations were not finally completed, and the Global Settlement agreement and related documents (including the TDP) were not executed, until December 23, 1993. App. 335a-336a. Thereafter, the settlement approval process, which is now before the Court, commenced. During the course of an eight-day settlement hearing before the District Court, neither the Ortiz petitioners, the Flanagan petitioners, nor any other class members contested the fairness of the settlement amount.

Notwithstanding the foregoing undisputed facts of record, petitioners try to portray this case as an attempt by venal plaintiffs' lawyers to aggregate the unaccrued personal injury claims of a disparate class of mostly uninjured persons into a cheap settlement with a wealthy asbestos manufacturer that illegitimately sacrifices class members' legal and constitutional rights to prosecute their individual tort claims as they choose. As an added embellishment, petitioners mischaracterize the claims-handling procedures established by

the TDP as a form of legislative alternative dispute resolution being inflicted on the class by the District Court and the Fifth Circuit. From those two entirely false factual premises, virtually all their legal arguments flow.[5]

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS NEITHER CONTRARY TO NOR INCONSISTENT WITH *AMCHEM*

Petitioners urge certiorari on the theory that the Fifth Circuit, on remand from this Court, refused to follow *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997). First, petitioners assert that the Fifth Circuit failed to follow *Amchem* by using the settlement itself as the basis for its determination that the commonality and typicality requirements of Rules 23(a)(2) and (a)(3) were satisfied. Second, petitioners claim that the instant case involves the same conflict of interest between two groups of class members that this Court held in *Amchem* precluded satisfaction of the adequacy of representation requirement of Rule 23(a)(4). Pet. 11-15. Neither of these arguments has any basis in fact or law and there is no conflict with *Amchem*.

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[5] The record in this case is extensive, although one would not know it from reading either the petitions or Judge Smith's dissenting opinions on which petitioners heavily rely. After hearing all the evidence presented at an eight-day evidentiary hearing (which was preceded by massive discovery taken by petitioners), the District Court resolved a number of factual disputes in the course of approving the Global Settlement. Petitioners do not challenge the proposition that the District Court's resolution of these factual disputes is subject to review for clear error, not appellate *de novo* review. Rule 52(a), Fed. R. Civ. P.; *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985).

1. In *Amchem*, this Court noted the wide variety of factual and legal questions presented by the class members' individual personal injury claims, and it accordingly held that the class action settlement failed to satisfy the requirement of Rule 23(b)(3) that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." 117 S. Ct. at 2249-50. In analyzing that issue, the Court stated that the common questions required by both Rule 23(a)(2) and Rule 23(b)(3) for class certification may not be established solely by reference to the class members' common interests in obtaining a settlement determined to be fair under Rule 23(e). Rather those questions, as well as the requirement of Rule 23(a)(3) that the claims of the class representatives be typical of those of the class, must be identified and evaluated by reference to "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id.* at 2249.

In an effort to make this case resemble *Amchem*, petitioners assert that the Fifth Circuit "refused to assess class certification in terms of the legal or factual questions in the complaint . . . and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed 'common interest' in seeking 'equitable distribution of compensation' under the settlement." Pet. 12-13. This contention grossly mischaracterizes what the Fifth Circuit did.

As both courts below recognized, the principal controversy resolved by the Global Settlement was whether class members would or would not be entitled to receive compensation for their existing or future personal injury claims against Fibreboard out of the only assets available to pay such claims — the insurance policies of Continental and Pacific. App. 58a, 276a. The availability of insurance coverage under those policies was already being litigated both

in the coverage case by Fibreboard and the insurers (App. 266a-276a) and in the *Andrus* case by some individual plaintiffs, Fibreboard and Continental (289a-290a, 379a-380a).

Those insurance disputes, which long preexisted this settlement, presented a tremendous risk to all class members and could only be resolved on a class-wide basis. The class's unitary need for a favorable resolution of the insurance disputes was pled in the complaint and, if necessary, could have been litigated by the class to judgment in an action against the insurers and Fibreboard. *See* pages 27-29, *infra*. The legal and factual questions presented by the insurance disputes thus "preexist[ed] any settlement" and "qualif[ied] each class member's case as a genuine controversy" (*Amchem*, 117 S. Ct. at 2249). All of these questions were common to the class, the class representatives' claims with respect thereto were typical of the class, and resolution of those questions was the primary accomplishment of the Global Settlement. App. 357a-358a, 415a.

It was by reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the "commonality" and "typicality" requirements of Rule 23(a), precisely as *Amchem* mandates. In its initial opinion, the Fifth Circuit repeatedly referred to the class members' common interest in eliminating the risk posed by the insurance coverage litigation in holding that the commonality and typicality requirements of Rule 23(a) were met. App. 56a-58a. Indeed, the court expressly distinguished the Third Circuit's decision in *Amchem* (then known as *Georgine*) on the basis that the instant case involves commonly held questions involving insurance coverage. App. 58a n.8. On remand, the Fifth Circuit referred to its prior opinion in reiterating its conclusion that the Rule 23(a) requirements were satisfied here. App. 2a-3a. There is thus no basis whatsoever for

petitioners' assertion that the Court of Appeals used the settlement itself as the basis for its "commonality" and "typicality" determinations.

2. Petitioners next contend that the Fifth Circuit has refused to follow a supposed *per se* rule of law established by this Court in *Amchem* to the effect that a material conflict always exists between "currently injured" and "exposure-only" members of a single class of mass tort victims. Pet. 13-15. In fact, the conflict identified in *Amchem* did not result from application of any *per se* rule, but from a concrete divergence of interests among the two groups that was created by the particular terms of the *Amchem* settlement. 117 S. Ct. at 2251. The Fifth Circuit correctly held that no similar conflict exists in this case because the factors cited by the Court in *Amchem* as evidencing such a conflict are totally absent here.

The settlement in *Amchem* established "a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements." 117 S. Ct. at 2240. The settlement, which was to be administered by the settling defendants themselves, listed four categories of compensable disease and specified the range of compensation payable for each category, without any adjustment for future inflation. The settlement also provided limits on the total number of claims payable for each disease in a given year and provided that specified categories of claims (otherwise cognizable under applicable state law) would receive no compensation at all. Class members were bound to the settlement in perpetuity, whereas defendants could withdraw after ten years. Finally, a few class members per year could opt out of the settlement and pursue their claims in court (although claims for punitive damages or increased risk of cancer were then barred). 117 S. Ct. at 2240-2241.

Since there was no fixed settlement amount to be divided among the class members in *Amchem*, there was no need for an equitable allocation of the settlement. Rather, this Court discerned a conflict between the currently-injured and exposure-only class members because the settlement itself made "essential allocation decisions designed to confine compensation and to limit defendants' liability" in a manner that materially affected the two groups differently. 117 S. Ct. at 2251. In particular, the Court emphasized the absence of an inflation adjustment for the fixed amounts payable for claims far into the future; the stringent limits on the number of class members who could take their individual claims to the tort system if dissatisfied with the settlement amounts offered them (the "back-end opt-outs"); and the total elimination of class members' loss-of-consortium claims for no compensation. 117 S. Ct. at 2251. Notwithstanding the differential impacts of these provisions on the two groups, they were not separately represented in the settlement negotiations. This Court accordingly upheld the Third Circuit's conclusion that neither the terms of the *Amchem* settlement nor the structure of its negotiations provided sufficient assurance that a single set of class representatives had adequately understood and addressed the identified conflicts. *Ibid.*

In assessing whether class members' interests meaningfully conflict, the contrast between *Amchem* and the instant case is stark. First, neither the currently-injured nor the exposure-only class members in *Amchem* faced any insurance coverage or other unitary risk that their claims would not be paid. Here, the members of both groups of the *Ahearn* class shared an identical need to eliminate Fibreboard's insurance coverage risks: absent a favorable resolution of those controversies, the claims of both groups against Fibreboard were equally worthless. App 357a-358a.

This gave the currently-injured and exposure-only class members in *Ahearn* a community of interest that was totally absent in *Amchem*.

Second, the structure and terms of the Global Settlement here include none of the aspects of the *Amchem* settlement on which the Third Circuit and this Court based their findings of a material conflict between currently-injured and exposure-only class members. The TDP does not fix the amounts to be paid for any particular category of class member claims; rather, it permits those amounts to fluctuate in response to developments in the tort system. Moreover, individual class member claims will be paid from a settlement fund that will be invested and grow over time. For both reasons, there is no need here for an inflation-adjustment provision to protect exposure-only class members, in contrast to the situation in *Amchem*. Similarly, the Global Settlement imposes no limits at all on the number of class members who can exercise back-end opt-outs to the tort system if dissatisfied with the settlement trust administrators' evaluation of their individual claims. App. 346a, 584a. Finally, there is in the instant case no set of class member claims, like the loss-of-consortium claims in *Amchem*, that are extinguished by the settlement for no compensation. Instead, subject to certain relatively inconsequential limitations applicable to all class members (discussed below), the claims-processing and distribution scheme established by the TDP allows each class member to resolve his or her claim, through litigation in state or federal court if necessary, for any amount to which the class member can establish entitlement under applicable law, in whatever jurisdiction the claim can properly be brought. App. 346a, 583a-621a.

Third, in sharp contrast to *Amchem*, the limitations on which petitioners base their conflict claim here — the elimination of punitive damages, a $500,000 cap on individual

recoveries, and the absence of pre-and post-judgment interest (Pet. 8, 16) — apply to all class members equally. There is no differential impact on currently-injured and exposure-only class members, as there was in *Amchem*. The limitations seized on by petitioners, moreover, have relatively minor real-world significance in this case, and they are clearly appropriate for ensuring an equitable division of a settlement fund that is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it. App. 372a.[6]

Finally, petitioners do not suggest, and there is no record evidence of, any conflict between currently-injured and exposure-only class members concerning the *amount* of the settlement ($1.535 billion). Because the amount was fixed, some equitable mechanism necessarily had to be established for allocating this money among class members. That mechanism was embodied in the TDP, a component of the

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[6] Punitive damages were almost never obtained historically against Fibreboard (App. 261a, 372a-373a) and, in any event, would constitute an unfair windfall to any class member recovering them from a settlement fund such as this whose goal is to allocate the settlement amount to compensate all class members equitably for their personal injuries.

Individual judgments against Fibreboard in excess of $500,000 had been exceedingly rare, and the insurance policies that constituted the only resource for paying claims of this magnitude contained $500,000 per person limits. App. 267a, 373a. Petitioners complain that the $500,000 cap is too low and thus favors exposure-only class members at the expense of the currently-injured (Pet. 16), while Judge Smith suggests that the cap is too high thus hurting exposure-only class members for the benefit of the currently injured (App. 26a). Such a disparity of views hardly supports the existence of a substantial conflict between the two groups on the point.

Finally, the elimination of pre- and post-judgment interest was relatively inconsequential in light of the District Court's unchallenged finding that claims against the settlement trust would likely be resolved and paid more quickly for most class members than in the tort system. App. 373a-374a.

Global Settlement that was negotiated months after the $1.535 billion settlement had been agreed upon in principle and announced publicly. App. 335a-336a, 346a-347a. Thus, even if petitioners were correct in asserting a meaningful conflict among class members as to *allocation* of the settlement amount, that conflict (in contrast to the situation in *Amchem*) would not justify reversing the lower courts' approval of the *overall settlement*. At most, it would justify a remand for the limited purpose of creating subclasses to renegotiate, and litigate if necessary, the detailed provisions of the TDP. *See* App. 148a. This is a wholly fact-bound question that does not warrant this Court's review.

3. Although the recovery limitations contained in the TDP apply equally to members of the currently-injured and the exposure-only groups, and are relatively inconsequential to boot, petitioners complain vociferously that the rights of the currently injured to immediate and full payment for their individual claims are being unfairly restricted. Pet. 13, 16. This is assertedly so because one purpose of those restrictions is to ensure the availability of funds to pay, on a fair and comparable basis, the later-filed claims of exposure-only class members who manifest their compensable injuries in the future. This argument boils down to an assertion that *any* restriction contained in this insurance settlement on the ability of currently injured class members to receive the maximum amount they could have obtained — assuming insurance coverage — in a race to judgment in the tort system created a *per se* conflict with exposure-only class members requiring the creation of separately represented subclasses. There is no basis in law or logic for any such *per se* rule.

Virtually every settlement of a class action is for an amount less than 100% of class members' potential aggregate claims — that is why it is a settlement and not a litigated judgment. And every settlement for less than 100% of such

claims will by definition require an equitable allocation of the settlement amount among the settling class members to ensure parity of treatment. The *per se* rule advocated by petitioners would require the creation of subclasses to negotiate this allocation in every case where one group of class members could plausibly contend that, absent a class settlement and any requirement for an equitable allocation thereof, they could win a race to judgment with another group of class members and thereby demand preferential treatment on their claims out of the settlement fund. This would be true (for example) in the common situation where some class members have individual suits already pending while others, prior to class notice, have not yet filed suit or may be unaware that they even have claims to assert. In making this argument, petitioners ignore both the inequity of the result they seek and the absence of any legal basis for their claim for preferential treatment.[7]

That this Court in *Amchem* intended to establish no general rule requiring subclassing whenever one group of class members has a superior shot at winning a race to judgment is demonstrated by the Court's favorable citation of the Manville Trust case, *In re Joint Eastern and Southern*

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[7] In any Rule 23(b)(1)(B) case where the limited fund pre-existed the settlement, petitioners' theory would require subclasses from the beginning for each and every group or individual within the class who could plausibly claim an ability to recover in full on his claim prior to exhaustion of the fund. The number of subclasses that could be sought in a limited fund tort case would be limited only by the imagination of the lawyers involved. For example, some class members could assert, using statistics, that cases brought in one jurisdiction will go to judgment faster than cases brought in others. Such arguments for subclassing would be totally inconsistent with the fundamental purpose for creating Rule 23(b)(1)(B) and applying it in limited fund cases, *i.e.*, to eliminate the adverse impact on some class members resulting from other class members' winning the race to judgment and exhausting the fund.

Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993). *See* 117 S. Ct. at 2251. In that limited fund case, the Second Circuit initially held that subclasses were required for two groups of class members that, as result of the order-of-filing priority (the "FIFO queue") governing processing of claims created by the claims resolution procedures of the now-insolvent Manville Trust, had conflicting interests arising from the first group's ability to be paid in full, thereby exhausting the funds available to pay the second group. 982 F.2d at 741-42.

On rehearing, however, the Second Circuit reversed its decision on this point and held that subclasses were not required for the two groups because, correctly interpreted, the Trust documents did not establish a payment priority that "created legally enforceable rights." 993 F.2d at 10. In the absence of such legal entitlement, the mere fact that the group of class members at the head of the FIFO processing queue would as a practical matter have occupied a favored position vis-a-vis the remaining class members was not sufficient, according to the Second Circuit, to require subclasses for the two groups. 993 F.2d 10-11. Here, petitioners can show no legally enforceable right for preference to be given to the claims of the "few class members who had already developed an asbestos-related disease" (Pet. 5) over the claims of the exposure-only class members. Despite petitioners' suggestions to the contrary (Pet. 15, 17), neither the Rules Enabling Act, 28 U.S.C. § 2072, nor the Rules of Decision Act, 28 U.S.C.

§ 1652, even purports to create substantive legal rights governing the entitlement of tort plaintiffs to recover on their claims in any particular order of priority.[8]

4. Although this issue is not included in petitioners' Questions Presented and the argument with respect to it is buried in a footnote (Pet. 14 n.7), respondents feel obligated to address petitioners' wholly unwarranted, but incendiary, contention that class counsel had a conflict of interest arising out of the prior settlement of individual cases. Petitioners base this contention on the assertions that (i) class counsel were "simultaneously" negotiating the class action and the separate settlement of their individual clients' cases (Pet. 14 n.7), (ii) those individual settlements were "for higher-than-average amounts" (Pet. 8), and (iii) those individual settlements were "*contingent on the approval of a global settlement - on any terms - of all future claims against*

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[8] There is no merit to petitioners' footnote assertion (Pet. 14 n.7) of a conflict between pre-1959 and post-1959 class members. The uninsured status of post-1959 class members had been eliminated long before the TDP was negotiated by three separate events. First, as a result of the Pacific agreement, by the end of 1992 Fibreboard had up to $330 million of insurance available to pay post-1959 claims. App. 284a-285a. Second, in the April 9 Agreement Continental agreed to fund any global settlement that it and Fibreboard could negotiate with Fibreboard's asbestos personal injury claimants without regard to whether such claimants had pre-1959 or post-1959 claims. App. 308a-310a. Third, the back-up Trilateral Agreement entered into between Fibreboard, Continental and Pacific on October 12, 1993, provided a fund that Fibreboard could use to pay both pre-1959 and post-1959 claims without distinction. App. 334a-335a, 354a-355a. Thus, when the settling parties negotiated the TDP after October 12, 1993, there was no basis on which anyone purporting to represent pre-1959 class members could have reasonably contended that pre-1959 class members should receive higher payments for equivalent claims than post-1959 claimants. The dissent's assertion to the contrary below (App. 415a-418a) has absolutely no support in the record.

Fibreboard" (Pet. 8, emphasis in original). Each of these assertions is either incorrect or misleading.

First, at the suggestion of Circuit Judge Higginbotham, acting as a mediator, the parties deferred negotiation of the Global Settlement until after Fibreboard, Continental and the Ness Motley firm had negotiated and Judge Parker had approved the modified Ness Motley settlement on August 9, 1993, which was the only settlement whose negotiations overlapped any of the three-party global negotiations earlier in 1993. App. 316a-319a. Several of class counsel — Messrs. Kazan and Wartnick and the firm of Caplin & Drysdale — were not involved in the Ness Motley settlement and thus could have no conflict of interest arising from its negotiation in any event. App. 312a-319a.

Second, the Ness Motley settlement was not "contingent on approval of a global settlement . . . of all future claims" (Pet. 8). Rather, 50% of the settlement amount was paid in cash and payment of the remaining 50% was conditioned upon the occurrence of any of *three* separate events — a Fibreboard win in the coverage case, a settlement of the insurance disputes between Fibreboard and Continental (as in fact occurred in the back-up Trilateral Agreement), or a global settlement among Fibreboard, Continental and a class of asbestos claimants. Tr. 1128; Fib. Trial Exs. 586, 909a. As the District Court found, every experienced asbestos plaintiffs' lawyer in the country had negotiated settlements under Fibreboard's partial payment and assignment settlement programs whereby payment was contingent on a favorable resolution of Fibreboard's insurance disputes. Thus, particularly given the time pressure created by the impending appellate decision in the coverage case, there was no way the class could obtain competent counsel not subject to the same supposed "conflict". App. 401a-404a. Moreover, the fairness of any global settlement would inevitably be subject to

searching scrutiny by other plaintiffs' counsel and by the courts. Class counsel's presumed desire to facilitate payment of the remaining 50% of their previously settled claims would thus have to include a motivation to negotiate a global settlement that was demonstrably fair to the class for which it was negotiated. App. 405a-407a. Neither petitioners' counsel nor anyone else has ever seriously contended that the amount of the Global Settlement was unfair.

Finally, petitioners' implication that class counsel were induced to sell out the class because some of those counsel — the Ness Motley representatives — had settled their existing cases at "higher than average amounts" (Pet. 8) is flatly contradicted by the record. The District Court explicitly found that (i) the settlement amounts in the modified Ness Motley agreement in 1993 were *lower* than those in the initial Ness Motley agreement in 1992 and (ii) the settlement amounts in the modified Ness Motley agreement were used by class counsel to negotiate a *higher* Global Settlement amount. App. 319a, 407a.

II. CERTIFICATION OF A RULE 23(b)(1)(B) CLASS IN THIS CASE CREATES NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS AND WAS PERFECTLY APPROPRIATE

1. Notwithstanding the complete absence of any contrary authority, whether from this Court or other circuits, petitioners seek review of the Fifth Circuit's affirmance of the District Court's class certification of this case under Rule 23(b)(1)(B). Ignoring the class's unitary interest in resolving the risk to all class members presented by the insurance disputes here, petitioners claim that this case involves an attempt to limit the substantive state law tort claims of class

members by converting them into a pro-rata share in an artificially limited settlement fund. Pet. 15-20.

Petitioners err, however, in asserting that the Rule 23(b)(1)(B) class certification here violates the Rules Enabling Act and the Rules of Decision Act by limiting class members' rights to obtain immediate and full payment of their individual state law claims. Pet. 15-17.

Virtually every class action settlement involving claims for money results in a compromise whereby class members receive less individually than they might have obtained if they successfully litigated their claims to judgment. No sensible argument can be made that application of Rule 23 to certify the class in such circumstances violates the Rules Enabling Act, much less the Rules of Decision Act. Any limitation on class members' "substantive" rights to full recovery on their individual claims results from the *settlement* not from the application of Rule 23.

Petitioners are thus flatly wrong in contending that their "substantive" state law rights (i) to recover more than $500,000 on a single claim, (ii) to recover punitive damages, and (iii) to recover pre- or post-judgment interest are being abridged by the lower courts' application of Rule 23(b)(1)(B). Pet. 16-17. It is the provisions of the TDP — which is a component of the Global Settlement agreement — that effects those limitations, not the purely procedural step of certifying a Rule 23(b)(1)(B) class here.

The real issue is whether the class had any claims that could properly be certified under Rule 23(b)(1)(B) and then, upon appropriate notice and hearing pursuant to Rule 23(e), settled in a manner which resulted in class members receiving less than 100 cents on the dollar for their individual claims. If the class claims may properly be certified under Rule 23(b)(1)(B) and the settlement of those claims is fair and

approved in accordance with the required procedures, no issue is presented under the Rules Enabling Act or the Rules of Decision Act, and petitioners have cited no authority from this Court or any other court to the contrary.

As discussed *supra*, at 1-5, the controversies among the parties that justified the certification of a mandatory class under Rule 23(b)(1)(B) to resolve those controversies had to do with the risk to the class that the insurance disputes between Fibreboard and its insurers would result in Fibreboard being left with no assets out of which to pay class members' claims against it. The principal insurance dispute creating this risk was the coverage case.

In addition, other insurance disputes — for example, whether Fibreboard's assignment settlements could be enforced against Continental or instead were breaches of its obligations under Continental's policy, thereby potentially forfeiting Fibreboard's right to coverage — were already being litigated in individual plaintiffs' actions like *Andrus*. *See* Fib. Trial Ex. 304. In any individual suit that Continental did not or could not settle — such as *Andrus* — there was a risk that a decision in Continental's favor would severely compromise other class members' ability to protect their interests — precisely the risk that Rule 23(b)(1)(B) is intended to foreclose.[9]

The class members' unitary interest in eliminating the risk resulting from the insurance disputes to their interests in being compensated for existing or future injuries caused by their exposure to Fibreboard's asbestos products was properly

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[9] Indeed, as noted earlier, after the Global Settlement was reached, an initial trial court decision upholding Fibreboard's assignment settlement program was reversed by the California Court of Appeals in the *Andrus* case. App. 379a-380a.

recognized by both the District Court and the Fifth Circuit majority as a basis for Rule 23(b)(1)(B) certification of the class in this case. App. 57a-58a, 488a-489a.

Petitioners prefer to characterize the class member interests here as "in personam" personal injury claims that are simply being aggregated for settlement purposes and to insist that the settling parties and the lower courts are attempting to justify Rule 23(b)(1)(B) certification by contending that the fund created by the settlement is a "limited fund." By attempting to confine the issue to the existence *vel non* of a limited fund, petitioners seek to have the propriety of the Rule 23(b)(1)(B) certification here turn on straw-man debates about whether this case is an *in rem* action (Pet. 17) and whether every case involving a settlement creates a "limited fund" because the settlement amount is not open-ended (Pet. 19).

These arguments are red herrings. Respondents are not claiming that the Global Settlement *itself* creates a limited fund that justified Rule 23(b)(1)(B) certification. Nor are respondents arguing that it is permissible simply to aggregate personal injury claims against a solvent or well-insured defendant for settlement purposes under Rule 23(b)(1)(B). What respondents contend, and what the District Court and the Fifth Circuit both held, is that it is consistent with the language and purpose of Rule 23(b)(1)(B), as well as legally and constitutionally permissible, to certify a mandatory class consisting of persons exposed to a defendant's asbestos products who have or will develop injury or death as a result of that exposure for the purpose of resolving a real controversy over disputed insurance coverage for that otherwise hopelessly insolvent defendant that will determine

whether any of the members of that unitary class will be compensated at all by that defendant for their claims.[10]

2. Petitioners attempt to minimize the significance of the insurance disputes by asserting that the Trilateral Settlement has "independently" resolved those disputes and that it "guarantees that Fibreboard will have ample insurance to pay future asbestos claims." Pet. 3-4. To the contrary, Fibreboard agreed to the Trilateral Settlement only at the insistence of class counsel as a condition of and a back-up to a Global Settlement with the class; absent the Global Settlement, there would have been no Trilateral Settlement. App. 329a-330a. Moreover, the Trilateral Settlement does not come into effect unless and until the Global Settlement is finally disapproved by the courts. App. 353a-355a. Thus petitioners' assertion that the Trilateral Settlement was negotiated independently of the Global Settlement is flatly wrong. Furthermore, far from "guaranteeing" ample insurance to pay future claims, the Trilateral Settlement would provide hundreds of millions of net dollars less to the class, and would probably leave Fibreboard without sufficient funds to pay

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[10] Judge Smith grudgingly accepted the proposition that the class had a genuine dispute with the insurers but claimed that that dispute did not justify the class's settlement with Fibreboard for what he termed a "mere" $10 million. App. 118a-119a. What Judge Smith and petitioners (Pet. 5) ignore is that (i) no settlement with Fibreboard's insurers was possible without the consent of Fibreboard, the insured, (ii) Continental had already agreed with Fibreboard in the April 9 Agreement that any Global Settlement would be paid entirely out of insurance, and (iii) Fibreboard would not give its consent unless the class accepted the insurers' payment as part of a complete settlement of the class claims against Fibreboard. App. 374a-376a. As for the $10 million of funds from Fibreboard, the issue for the class was whether the total settlement amount of $1.535 billion was reasonable. As is the case with most settlements with insured defendants, it was a matter of indifference to the class whether that amount came from Fibreboard, its insurers or some combination of them.

those class members whose injuries manifest themselves many years in the future. App. 358a-359a, 361a-367a, 501a-502a.[11]

Petitioners' vociferous attack on the use of a Rule 23(b)(1)(B) mandatory class to resolve the instant insurance disputes is puzzling in light of their acquiescence in substantially the same procedure in the companion *Rudd* case which approved the Trilateral Settlement. As required by the parties' agreement, a class action suit was commenced in *Rudd* in which virtually the same persons who comprise the plaintiff class here were included as a defendant class in an action seeking a declaration that the Trilateral Settlement was fair and reasonable to, and binding upon, the class.[12] *Rudd* was ultimately resolved when the class consented to the relief sought. Although the *Rudd* suit and the instant case raised many of the same issues concerning the propriety of Rule 23(b)(1)(B) certification of a non-opt-out class consisting of exposure-only and currently injured asbestos claimants, those aspects of the *Rudd* case were not challenged by the Ortiz petitioners nor objected to by Judge Smith when such objections were pressed by the Flanagan petitioners, and *Rudd* is now final. *See* Pet. 4 n.4, App. 93a-97a, 109a.

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[11] Petitioners suggest (Pet. 2 n.1) that Fibreboard's 1997 acquisition by another asbestos defendant, Owens-Corning, could "expand enormously" the assets available to pay claims against Fibreboard. This development occurred four years after this case was settled; it is obviously irrelevant in deciding whether the lower courts' decisions based on the factual record as it existed when the settlement was approved were correct. In any event, petitioners nowhere explain how Owens-Corning's purchase of Fibreboard's stock could make Owens-Corning's assets available to satisfy claims against Fibreboard, which remains a wholly separate corporation.

[12] Also included were persons who had filed but not settled or gone to judgment in cases against Fibreboard as of August 23, 1993. *See* page 5, note 4, *supra*.

The enthusiasm of petitioners' counsel for the Trilateral Settlement, notwithstanding its strikingly inferior benefits for the class, is at least partially explicable by their desire for higher attorneys' fees. One of the reasons why the Global Settlement produces far greater net dollars for the class is that it limits the fees chargeable by plaintiffs' counsel for prosecuting claims against the settlement trust to a maximum of 25% of any recoveries. By contrast, fees equal to 33%-40% of the recovery are normally charged by plaintiffs' counsel, including counsel for petitioners, in the tort system. App. 365a.[13]

3. Petitioners contend that, because the motivating force behind the settlement from the perspective of the class was the insolvency of Fibreboard should it lose the insurance disputes, effectuating the settlement outside of bankruptcy is an improper attempt to circumvent the Bankruptcy Code. Pet. 19-21. However, petitioners' "circumvention" argument must be premised on the proposition that application of the Bankruptcy Code was an available and realistic option for the class here — a premise that is demonstrably wrong.

The District Court found that Fibreboard would not file for bankruptcy as long as it had any hope of prevailing on the coverage disputes with the insurers. App. 375a-376a. The members of the *Ahearn* class by definition had not yet filed suit against Fibreboard and thus had no unpaid judgments against it; they could not have sought to put Fibreboard into bankruptcy involuntarily even had they desired to do so. App. 375a. *See* 11 U.S.C. § 303(b)(1); *In re Raymark Industries, Inc.*, Case No. 89-20233T (Bankr. E.D.Pa., Aug. 9, 1996) (as long as asbestos manufacturer continues to

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[13] Indeed, counsel for the Flanagan petitioners made his concern over the reduction in his prospective fees quite explicit at the settlement fairness hearing. *See* Tr. 1296-1301.

dispute its liability and pay judgments as due, asbestos claimants cannot put it into involuntary bankruptcy).

Those persons outside the *Ahearn* class who did have unpaid settlements with Fibreboard had uniformly determined not to seek to put Fibreboard involuntarily into bankruptcy pending the outcome of its insurance disputes because a favorable outcome of those disputes was the only way in which they could hope to be paid over $1.2 billion in settlements then outstanding. App. 277a-279a, 285a-286a, 302a-303a. Having Fibreboard in bankruptcy would not facilitate or improve its chances of prevailing in the coverage case or any of its other insurance disputes; bankruptcy proceedings would merely reduce Fibreboard's value by interfering with its business operations.

Since Fibreboard could lose the insurance disputes whether in or out of bankruptcy, and since the class had no ability or motive to force Fibreboard into bankruptcy until and unless it *lost* the coverage disputes, the only way for the class to protect itself against the risk of that loss was to participate in a negotiated settlement of the insurance disputes with the insurers and Fibreboard. Once that settlement was secured, Fibreboard was no longer faced with insolvency and the class could equitably share in the settlement fund pursuant to Rule 23(b)(1)(B) and Rule 23(e). Such a resolution is plainly consistent with the Bankruptcy Code, which permits the dismissal or suspension of pending bankruptcy cases where an arrangement is worked out among the debtor and its creditors outside of bankruptcy court. *See* 11 U.S.C. § 305(a).

III. THE CLASS ACTION CLAIMS SETTLED HERE AROSE FROM A JUSTICIABLE CONTROVERSY

As an adjunct to their efforts to ignore and avoid the insurance disputes that formed the motivation for and basis of

the settlement challenged here, petitioners claim that this class action does not present a justiciable controversy under Article III of the Constitution because "the negotiations [of the settlement] did not involve the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate alternative dispute resolution scheme to take control of any and all *future* asbestos claims against Fibreboard." Pet. 26.[14]

Petitioners base their contention that the settlement here affects primarily class members who "have no injuries and no ripe legal claims" (Pet. 25) on their insistence that (i) the only claims of injury asserted in the complaint on behalf of the "exposure-only" majority of class members were for fear of cancer, enhanced risk of developing cancer and medical monitoring, (ii) those claims neither could nor were intended to be actually litigated, and (iii) the settlement provided no specific redress for those claims. Pet. 27.

Petitioners appear to read this Court's decision in *Amchem* to have adopted the Third Circuit's holding below, *Georgine v. Amchem Products, Inc.*, 83 F.2d 610, 625 (3d Cir. 1996), that a class action cannot be certified under Rule 23 if it asserts claims that cannot be litigated to judgment in the absence of a settlement and, based on that reading, argue that the class settlement here was improperly approved because the complaint that commenced this action similarly

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[14] Petitioners are clearly wrong in characterizing this settlement as creating a compelled alternative dispute resolution system that deprives them of their day in court. The settlement offer negotiation process established by the TDP, including non-binding mediation and arbitration, is ultimately consensual because if, in the prosecution of an individual claim, a class member is dissatisfied with the results of that process, he or she has an absolute right to sue the trust in the tort system. App. 585a-598a.

asserted no claim that could have been litigated in the absence of a settlement.

This approach stands the issues discussed in *Amchem* on their heads. At most, the question is not whether the parties have settled the issues they pleaded but, rather, whether they could have litigated the issues they settled.[15]

Notwithstanding petitioners' tortured lo[illegible] this case plainly involves a justiciable controversy. As described above, the representative plaintiffs and all class members here had a strong and unitary interest in the outcome of an existing coverage dispute. That interest was pleaded in the complaint (App. 556a-559a) and class members had standing to litigate that interest under California law,[16] as well as under the Declaratory Judgment Act, 28 U.S.C. § 2201.[17] Indeed, they could properly have litigated that interest in a Rule 23(b)(1)(B) class action since the piecemeal prosecution of

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[15] Even this proposition may overstate the question in light of the decision in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996), where this Court upheld a class action settlement that resolved claims that were not pleaded and, for jurisdictional reasons, could not have been litigated in the action that was settled.

[16] California law, which would govern under Texas conflicts of law rules, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984), permits third-party plaintiffs to obtain declaratory relief against a defendant's insurer before judgment on a coverage question to determine the existence and scope of coverage. *See Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965). *See also Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993). *Compare Shapiro v. Republic Indem. Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).

[17] *See Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978).

separate actions by individual class members over the coverage issues would as a practical matter be dispositive of the interests of the remaining class members — the very predicate of a Rule 23(b)(1)(B) case. Moreover, as a suit seeking declaratory relief, such an action could also have proceeded as a mandatory, non-opt-out class action under Rule 23(b)(2).[18] Such a declaratory judgment action could have been settled among the plaintiffs, Fibreboard and Continental just as happened here.

Thus, if the Court were to grant review on the "justiciability" issue framed by petitioners, the only question would be whether or not to deem the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings, pursuant to 28 U.S.C. § 1653 and Rule 15(b) of the Federal Rules of Civil Procedure.[19] That question hardly merits review. *Compare Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2 (1997). Petitioners' other arguments that this case does not satisfy Article III requirements, together with their arguments that due process

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[18] That rule provides for mandatory class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

[19] Appellate courts permit pleading amendments on appeal where necessary to affirm a trial court judgment. *See* 28 U.S.C. § 1653; 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d § 1494 (1990). Indeed, both this Court and courts of appeal have deemed pleadings "constructively amended" to conform them to the proof and decision below without requiring a formal motion to amend from the plaintiff. *See, e.g.*, *Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2 (1997); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388-89 (5th Cir. 1984); *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 201-02 (5th Cir. 1965).

requires opt-out rights here and that adequate notice could not be given to the class, are fully addressed in the opposition briefs being filed concurrently by respondents Continental and Pacific and respondent Fibreboard.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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